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In The Supreme Court Of The United States

October Term, 1973

No. 73-452

CITY OF TOPEKA, KANSAS
CITY OF TOPEKA STREET DEPARTMENT,
Petitioner,

v.

THE KANSAS COMMISSION ON CIVIL RIGHTS

PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

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v.

THE KANSAS COMMISSION ON CIVIL RIGHTS

PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

The petitioner, the City of Topeka, Kansas, Street Department, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Kansas rendered in these proceedings on June 9, 1973.

OPINIONS BELOW

The opinion of the District Court of Shawnee County, Kansas, unreported, appears at Appendix A,

infra, p. 13. The opinion of the Supreme Court of the State of Kansas, 212 Kan. 398, 511 P. 2d 253, also appears at Appendix B, infra, p. 17. The Supreme Court of the State of Kansas affirmed the judgment of the District Court of Shawnee County, Kansas.

JURISDICTION

The order or judgment of the Supreme Court of the State of Kansas was entered on June 9, 1973. See Appendix B, p. 17, infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED

After receiving an adverse finding from the Kansas Commission on Civil Rights that three employees of the Street Department of Topeka, Kansas, were discharged through a discriminatory employment practice, the City of Topeka Street Department appealed to the District Court of Shawnee County, Kansas. The District Court's decision that the city's appeal was untimely was affirmed by the Supreme Court of the State of Kansas. The question thereby arising is:

1. **Whether the action of the Supreme Court of the State of Kansas affirming the lower court judgment holding the time for appeal from the Commission's order commences to run on the date which the Commission served its decisional order, despite the Commission's administrative rule stating all denials or motions for**

rehearing would be so acted upon in writing, is consistent with the due process of law requirement of the 14th Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

> " . . . nor shall any state deprive any person of life, liberty, or property without due process of law . . . "

STATEMENT OF FACTS

The facts relevant to the question presented by this petition are uncontroverted and therefore may be introduced to the Court in a summary fashion.

The petitioner, the City of Topeka Street Department, is an integral part of the municipal corporation, the City of Topeka, Kansas. This case originated when three employees of the Street Department, Oris Tunley, Jr., Vernon Steele and Harold Roundtree, complained to thhe Kansas Commission on Civil Rights (KCCR) alleging unlawful employment practices by the City of Topeka Street Department. In November, 1970, a hearing was held by the KCCR on the complaints of the three ex-employees.

On March 20, 1971, the KCCR rendered its findings of fact and conclusions of law in an order which found the City had terminated the employment of the three men in an arbitrary and capricious manner because of their race. The City of Topeka Street Department

was ordered by the KCCR to offer the three complainants their former positions with full rights, benefits and privileges of employment and to remunerate them with back pay as well as to implement an affirmative action program to provide equal employment opportunities.

On March 26, 1971, the appellant filed an application for rehearing on the findings of fact, conclusions of law and order entered by the KCCR. Subsequently, it is uncontroverted that the City of Topeka Street Department made numerous requests for permission to orally argue its application for rehearing pursuant to Kansas Administrative Regulation (KAR) 21-22-8 which the KCCR had adopted.

DISTRICT COURT LITIGATION

On June 3, 1971, the KCCR filed its petition for enforcement of its final order pursuant to K.S.A. 44-1011. There were no communications between the KCCR and your petitioner concerning any denial of the petitioner's application for rehearing during the period March 21, 1971, to June 3, 1971. The Street Department's answer, filed June 7, 1971, requested that it be permitted to file its appeal from the KCCR's order of March 20, 1971, alleging that it relied upon the provisions of Kansas Administrative Regulation 21-22-17, which reads:

> "When the commission *denies* an application for rehearing, it *shall* so notify in writing the party making such application and all other persons served with a copy of the application in con-

> formity with the provisions of 21-22-13. Such notice may, in the discretion of the hearing commissioners, set forth the reason(s) why the application was denied and shall include a notice of the statutory right to judicial review. Such notice shall be delivered by certified mail, return receipt requested, by regular mail or by personal delivery." (emphasis ours)

Because it had received no written notification of the denial of its application for rehearing, the Street Department thereby had not taken this appeal within ten (10) days from the Commission's order as provided by K.S.A. 44-1010 which provides in pertinent part:

> "Any party being dissatisfied with any order or decision of the commission may, within ten (10) days from the date of the service of such order or decision, apply for a rehearing in respect to any matter determined therein; the application shall be granted or denied by the commission within ten (10) days from the date same shall be filed, and if the rehearing be not granted within ten (10) days it shall be taken as denied. If a rehearing be granted the matter shall be determined by the commission within thirty (30) days after the same shall be submitted . . . "

The District Court rejected the City Street Department's argument and entered judgment for the KCCR, enforcing its order against the City, on March 13, 1972.

KANSAS SUPREME COURT LITIGATION

In the Supreme Court of the State of Kansas, the Street Department argued that it relied on the provisions of KAR 21-22-17 and was thereby prejudiced; that an administrative agency which has rule making power, as the KCCR has in this case pursuant to K.S.A. 1972 Supp. 44-1004(3), cannot ignore or violate its own rules of procedure to the prejudice of a party involved in proceedings pending before it. The City Street Department argued that the Commission is estopped to take a position inconsistent with its own regulations; that any action taken by the Commission is void until it complies with its own rules and that the statute of limitations is tolled in this case until such time as the City Street Department is afforded the opportunity to present oral arguments on its application for rehearing. For the first time, the city argued in its brief at this point that to do otherwise would be to deprive the City of Topeka Street Department due process.

The KCCR, on the other hand, contended it did not violate or ignore KAR 21-22-17, but that an application for rehearing could be denied in either one of two ways: (1) By operation of law under K.S.A. 44-1010 when the Commission fails to grant a rehearing within ten (10) days after the application is filed or (2) by positive action taken by the Commission pursuant to KAR 21-22-17 which, it argued, becomes applicable only when the Commission denies a rehearing within the ten (10) day period. The Supreme Court of the State of Kansas ruled that the

Commission's failure to grant a rehearing within ten (10) days after the City's application for the same was filed constituted a denial of a rehearing by virtue of K.S.A. 44-1010 and that KAR 21-22-17 must be read in connection with 44-1010; and notice of a denial of application for rehearing is not mandatory despite the word "shall" which is used in the regulation. The Supreme Court found that since the City Street Department had failed to appeal within thirty (30) days as provided in K.S.A. 1972 Supp. 44-1011, the District Court was without jurisdiction in obtaining the attempted appeal and that the District Court correctly entered judgment for the enforcement of the KCCR's order.

After admitting that as a general rule an administrative agency may not violate or ignore its own regulations and that where the agency fails to follow the rules which it has promulgated its orders are unlawful, the Supreme Court of the State of Kansas concluded by finding that where, under the provisions of K.S.A. 44-1010, the denial of an application for rehearing of an order issued by the Kansas Commission on Civil Rights results from the Commission's failure to grant a rehearing within ten (10) days from the date the application was filed, written notice of the denial is not required by KAR 21-22-17 and the time for appeal commenced to run from the date on which the Commission served its decisional order.

The Supreme Court of the State of Kansas based this finding of law on the somewhat shaky ground that an administrative regulation must be construed

in harmony with the statute relating to the same subject matter to the end that both may be given effect if possible.

While this certainly sounds proper, in substance, the end result was to deny your petitioner due process of law.

REASONS FOR GRANTING THE WRIT

1. The decision below directly conflicts with this Court's ruling in such cases as *Service v. Dulles*, 354 U.S. 363; *Vitarelli v. Seaton*, 359 U.S. 535; and *Accardi v. Shaughnessy*, 347 U.S. 260.

In *Accardi v. Shaughnessy*, supra, this Court held the Board of Immigration Appeal's failure to follow its existing regulations requiring it to exercise its discretion in a particular deportation hearing was reversible error. *Accardi* was decided in 1954.

In *Service v. Dulles*, 354 U.S. 363, this Court held the petitioner, who was a foreign service officer in the State Department, was the subject of an invalid discharge because the discharge violated regulations of the Department of State which were binding on the Secretary of State.

John S. Service, the petitioner, contended that the Secretary of State's action in dismissing him was subject to attack under the principles established by the Court in *Accardi v. Shaughnessy*, supra, in that "regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the

administrative action under review is discretionary in nature." (P. 372.)

In sustaining the petitioner's contention that the regulations promulgated by the governing administrative body were binding upon it, this court stated,

> "While it is of course true that under the McCarran Rider, the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so, as we have already held, and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them." (P. 388.)

Service v. Dulles was decided in 1957.

Vitarelli v. Seaton, 359 U.S. 535, dealt with a petitioner who was an employee of the Department of the Interior in a position not designated as "sensitive." The petitioner had no protective civil service status and could have been discharged without cause, however, the Secretary of the Interior chose to proceed against the petitioner on security grounds as a basis for the petitioner's dismissal. In holding that the petitioner's dismissal was illegal and that he was entitled to reinstatement in his position, this Court said,

> "In this instance an examination of the record, and of the transcript of the hearing before the departmental security board, discloses that petitioner's procedural rights under the applicable regulations were violated in at least three mate-

rial respects in the proceedings which terminated in the final notice of his dismissal." (P. 540.)

In a separate opinion written by Mr. Justice Frankfurter and joined in by Mr. Justice Whittaker, Mr. Justice Stewart and Mr. Justice Clark, it was said that,

> " . . . if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. See *Service v. Dulles*, 354 U.S. 363. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword. Therefore, I unreservedly join in the Court's main conclusion, that the attempted dismissal of Vitarelli in September 1954 was abortive and of no validity because the procedure under Department of the Interior Order No. 2738 was invoked but not observed." (pp. 546-547.)

The Kansas Commission on Civil Rights' absolute disregard for its own rules and its refusal to follow its own promulgated rules is clearly a violation of due process requirements and the Commission's actions have clearly prejudiced the petitioner herein. The Kansas Supreme Court's decision is patently erroneous and is clearly contrary to the law as this Court has repeatedly stated it.

Not only is the rule of law as announced in *Dulles*, *Shaughnessy*, and *Seaton* recognized in the United States Supreme Court, but it is also widely followed in cases which are legion.

In the past year alone, numerous decisions in federal district courts have supported your petitioner's contention.

The United States District Court for the Southern District of New York held in *Justice v. Board of Education*, 351 F. Supp. 1252, that,

> "Agency officials are no less bound than the Courts to obey their own formal and authoritative rules." (p. 1260.)

In *Justice* the Court cited *Dulles* and *Accardi* with approval.

The United States District Court for the Southern District of New York held in *Otero v. New York City Housing Authority*, 344 F. Supp. 737, that,

> "An administrative agency may not breach the promise of its own regulations and defeat the reliance of people on such a promise."

The United States District Court for the Eastern District of Pennsylvania held that, "Rules and policies promulgated by administrative agencies are binding on them, and must be observed, even though the rules be a privilege, gratuitously established, rather than constitutionally mandated or established by statute." *United States v. Green*, 344 F. Supp. 474.

In *Francis v. Davidson*, 340 F. Supp. 351, decided by the United States District Court of Maryland, 1972, it was stated,

> "Once administrative agency has promulgated regulation, even in instances where it is not

> required to do so, agency is bound to follow its regulation, and this is particularly true where regulation uses unambiguous, mandatory language."

For the sake of brevity, your petitioner will not cite any further cases although those in point are innumerable. However, it does seem appropriate to reiterate one last time that the decision rendered by the Supreme Court of the State of Kansas is clearly erroneous; clearly in conflict with the decisions of this Court and those of inferior federal courts, and must be corrected. The decision of the Kansas Supreme Court causes unjust discrimination, denies adequate notice, and violates the fundamental concepts of fair play and due process which are such a basic part of our law.

CONCLUSION

For these reasons, your petitioner prays a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of the State of Kansas.

Respectfully submitted,
CITY OF TOPEKA, KANSAS
A Municipal Corporation
/s/ C. BRUCE WORKS
Counsel of Record
/s/ DAN E. TURNER
City Attorney
/s/ DOUGLAS C. RICHARDS
Assistant City Attorney

Dated this.....day of....., 1973.

APPENDIX A

DISTRICT COURT OF KANSAS
THIRD JUDICIAL DISTRICT

SHAWNEE COUNTY, KANSAS

March 13, 1972

Mr. Jack N. Williams
Assistant Attorney General
State Capitol Bldg.
Topeka, Kansas 66612

Mr. Edwin P. Carpenter
Assistant City Attorney
City of Topeka
215 East 7th Street
Topeka, Kansas 66603

Re: Oris Tunley, et al v. City of Topeka
Case No. 116127

Gentlemen:

The Court has reviewed the file, arguments and briefs of the parties. The facts are not in dispute:

1. On November 24, and 25, 1970, a hearing was held by KCCR on complaints of Tunley, Steele, and Roundtree against the City of Topeka, for alleged unlawful employment practices. Hearing was held under KSA 44-1005.

2. On March 20, 1971, the Commission rendered its decision finding against the City. On March 26, 1971, the City filed its application for rehearing.

3. No formal action was taken by the Commission

on the rehearing application nor any written notice of denial given to the City.

4. No appeal was taken to the District Court by the City from the decision made by the Commission.

5. On June 3, 1971, the Commission filed its petition to enforce its order in this Court under KSA 44-1011.

6. The City contends that the Commission had the duty under its Rules and Regulations, 21-22-8 and law to afford a rehearing to the City or notify the City of the denial of the same in writing.

The pertinent statute is KSA 44-1010, which provides for a rehearing, provided that the application is filed within ten (10) days from date of service of the decision. Further that the application shall be granted or denied within ten (10) days from filing date; *and if the rehearing be not granted within ten (10) days, it shall be taken as denied.*

The Rules and Regulations pertinent are 21-22-14 through 21-22-19, and particularly 21-22-17.

A careful reading of the statute and regulations does not lead to the conclusion of any inconsistency or contradiction.

The rehearing section is quite similar to the motion for new trial provision, whereby the arbiter is given an opportunity to correct its errors before appeal is perfected.

In this case, the City had its hearing before the

Commission and a decision was rendered. Within due time the City applied for a rehearing and requested oral arguments. The Commission failed to act and thus 44-1010 comes into play. The City was well aware that if no rehearing is granted within ten (10) days, the application shall be treated as denied. No appeal was taken by the City.

Under 21-22-17, when the Commission denies an application for rehearing, it shall so notify in writing the party. It may, in its discretion, set forth the reasons for denial.

Even though the regulation, once promulgated and published has the same effect of law, it must be read in the context and in conjunction with 44-1010, and a logical instruction would be that the written notice of a denial of an application is not mandatory, notwithstanding the word "shall" is used.

Therefore, the Court finds that KSA 44-1010 controls and the failure of the Commission to grant a rehearing within ten (10) days from March 26, 1971, constituted a denial of the application.

Further the failure of the City to file a notice of appeal within thirty (30) days as required by KSA 44-1010 gives this Court no jurisdiction, hence the appeal filed by the City, as part of its amended answer, on June 24, 1971 is void.

On the basis of the Court's rulings, judgment is awarded to the Kansas Commission on Civil Rights for enforcement of the final order rendered by said Commission on March 20, 1971, on the basis that

there is no genuine issue as to any material fact and under KSA 60-256 (c) judgment is appropriate.

The Court will retain jurisdiction to issue any further relief as prescribed in KSA 44-1010.

Judgment is effective this date.

/s/ MICHAEL A. BARBARA
District Judge

APPENDIX B

No. 46,851

THE KANSAS COMMISSION ON CIVIL RIGHTS,
Appellee,

v.

THE CITY OF TOPEKA STREET DEPARTMENT,
Appellant.

SYLLABUS BY THE COURT

1.

As a general rule an administrative agency may not violate or ignore its own regulations, and where it fails to follow the rules which it has promulgated its orders are unlawful.

2.

The rule is subject to the qualification that regulations adopted by an administrative agency must lie within its competence to make, and its regulations may not contravene or nullify controlling statutes.

3.

As is the case in the interpretation of any law, the prime objective in construing laws creating and empowering administrative agencies is to ascertain and give effect to legislative intention.

4.

K.S.A. 44-1010 indicates a legislative intent that post-hearing procedures shall not be protracted or unduly delayed.

5.

An administrative regulation must be construed in harmony with a statute relating to the same subject

matter to the end that both may be given effect if possible.

6.

Where, under the provisions of K.S.A. 44-1010, the denial of an application for a rehearing of an order issued by the Commission on Civil Rights results from the commission's failure to grant a rehearing within ten days from the date the application was filed, written notice of the denial is not required by K.A.R. 21-22-17 and the time for appeal commences to run from the date on which the commission served its decisional order.

7.

The record is examined in an action to enforce compliance with an order issued by the Commission on Civil Rights and for reasons set forth in the opinion it is *held* the trial court did not err (1) in ruling that the appeal was attempted out of time and (2) in entering judgment in favor of the commission.

Appeal from Shawnee district court, division No. 2; MICHAEL BARBARA, judge. Opinion filed June 9, 1973. Affirmed.

ROBERT E. HOFFMAN, assistant city attorney, argued the case, and DAN E. TURNER, city attorney, was with him on the brief for the appellant.

DENNIS MOORE, assistant attorney general, argued the cause, and VERN MILLER, attorney general, and JACK N. WILLIAMS, assistant attorney general, were with him on the brief for the appellee.

The opinion of the court is delivered by

FONTRON, J.: This action is brought by the Kansas Commission on Civil Rights against the Topeka Street Department to enforce an order entered by the commission. The district court ordered the street department to comply with the order and the department has appealed. We shall refer to the parties as the commission on the one hand, and the department on the other.

There is little or no dispute as to the facts. In the waning days of October, 1969, three employees of the street department were discharged. Shortly thereafter these employees filed complaints against the city charging it with discriminatory acts in violation of the Kansas Act Against Discrimination, hereafter referred to as the Act.

A public hearing was eventually held on the complaints filed by the employees and on March 20, 1971, the commission issued findings to the effect that the complainants were discharged arbitrarily because of their race and that the street department maintained a discriminatory pattern of employment. The commission ordered the department to offer the complainants their former positions, to pay them their back pay and to cease its discriminatory employment practices.

On March 26, 1971, the department filed an application for rehearing and requested permission to present oral argument on the merits of the application. The commission took no action on the application for

rehearing or on the department's request for oral argument, although it would appear from an affidavit included in the record that the request was repeated more than once.

The present action was filed June 3, 1971, no appeal having been taken by the department from the commission's order of March 20. In its answer filed June 7, 1971, the department asked that it be permitted to file its appeal from the order of March 20, 1971, and this request was renewed in an amended answer filed June 24.

At this point it becomes our responsibility to mention certain statutory provisions which are material to the case at hand. K.S.A. 44-1010 provides in pertinent part:

> "Any party being dissatisfied with any order or decision of the commission may, within ten (10) days from the date of the service of such order or decision, apply for a rehearing in respect to any matter determined therein; the application shall be granted or denied by the commission within ten (10) days from the date same shall be filed, and if the rehearing be not granted within ten (10) days it shall be taken as denied. If a rehearing be granted the matter shall be determined by the commission within thirty (30) days after the same shall be submitted. . . . "

Likewise pertinent to our discussion is that portion of K.S.A. 1972 Supp. 44-1011, reading as follows:

> "The attorney general, county attorney or any person aggrieved by an order made by the com-

> mission may obtain judicial review thereof in the said court by filing with the clerk of said court within thirty (30) days from the date of service of the order, a written appeal praying that such order be modified as set aside. . . . "

The department does not question the authenticity of either statutory provision, and it concedes that no effort was made to appeal from the March 20 order until June 7, 1971, some seventy-eight days after the order was made. The department excuses its failure to attempt an earlier filing of its appeal on the ground that the commission did not follow its own rule, K.A.R. 21-22-17, which reads:

> "When the commission denies an application for rehearing it shall so notify in writing the party making such application and all other persons served with a copy of the application in conformity with the provisions of 21-22-13. Such notice may, in the discretion of the hearing commissioners, set forth the reason(s) why the application was denied and shall include a notice of the statutory right to judicial review. Such notice shall be delivered by certified mail, return receipt requested, by regular mail or by personal delivery."

The position assumed by the department is that it relied on the provisions of the foregoing regulation and was thereby prejudiced; that an administrative agency having rule making power, as the commission has in this case under K.S.A. 1972 Supp. 44-1004(3), cannot ignore or violate its own rules to the prejudice of a party involved in proceedings pending before it;

that the commission is estopped to take a position inconsistent with its own regulations; that an action taken by the commission is void until it complies with its own rules and the statute of limitations is tolled in this case until such time as the department is afforded an opportunity to present oral argument on its application for rehearing.

On the other hand, the commission contends it did not violate or ignore rule 21-22-17; that an application for rehearing may be denied in either one of two ways: (1) by operation of law under K.S.A. 44-1010 when the commission fails to grant a rehearing within ten days after the application is filed and (2) by positive action taken by the commission itself; that the provisions of K.A.R. 21-22-17 become applicable only when the commission denies a rehearing within the ten-day period and not where a denial takes place as a matter of law resulting from the commission's inaction.

The trial court ruled that the commission's failure to grant a rehearing within ten days after application therefor was filed constituted a denial of a rehearing by virtue of K.S.A. 44-1010; that K.A.R. 21-22-17 must be read in connection with the statute; that notice of the denial of an application for rehearing is not mandatory notwithstanding the word "shall" is used in the regulation; and that since the department failed to appeal within thirty days as provided in K.S.A. 1972 Supp. 44-1011, the court was without jurisdiction to entertain the attempted appeal. Judg-

ment was accordingly entered for enforcement of the commission's order.

In our opinion the city's position is not tenable and cannot be sustained, even though we agree with the salutary rule that in general an administrative agency cannot violate its own rules and regulations with impunity. Agreement with this general proposition was clearly indicated by this court in *Cities Service Gas Co. v. State Corporation Commission*, 201 Kan. 223, 440 P. 2d 660. We have no quarrel with the authorities cited by the department which support the principle that in those instances where an administrative agency fails to follow its own rules, its orders are unlawful. (*Clairborne v. Coffeyville Memorial Hospital*, 212 Kan. . . ., . . . P. 2d . . ., No. 46,814, this day decided.)

But the rule is subject to an important qualification: the regulation adopted by the administrative agency must lie within its competence to make; an administrative regulation may not contravene or nullify a controlling statutory enactment. In 1 Am. Jur. 2d, Administrative Law, §126, p. 937, this underlying principle is phrased in these terms:

> "Some cases expressly recognize that the rule-making power which may be conferred is the power to make reasonable rules and regulations, not inconsistent with law, and subject to the implied constitutional limitation that the administrative agency must not legislate. The delegation of power to make rules and regulations cannot extend to the making of rules which subvert the statute reposing such power, or which

are contrary to existing laws, or which repeal or abrogate statutes."

Illustrations of this principle are not wanting in the general case law of this country. In *Kettell v. Johnson & Johnson*, 337 F. Supp. 892, a case which incidentally involved the federal Civil Rights Act, the court expressed the rule in this fashion:

> "Where administrative regulations go beyond any legitimate interpretation of a statute they must fall so that the true Congressional intent may be vindicated. Neither the courts nor administrative agencies are free to substitute their own standards—even though they deem them superior —for the standard imposed by the legislative act. . . . " (p. 895.)

Similarly, in *Harris v. Alcoholic Bev. etc. Appeals Bd.*, 228 C.A. 2d 1, 39 Cal. Rptr. 192, the California court said:

> "In the absence of valid statutory authority, an administrative agency may not, under the guise of a regulation, substitute its judgment for that of the Legislature. It may not exercise its sub-legislative powers to modify, alter or enlarge the provisions of the legislative act which is being administered. . . . " (p. 6.)

Kansas adheres to this rule. In *State, ex rel. v. Columbia Pictures Corporation*, 197 Kan. 448, 454, 417 P. 2d 255, we said:

> " . . . The power to adopt rules and regulations is administrative in nature, not legislative, and to be valid, must be within the authority con-

ferred. An administrative rule and regulation which goes beyond that which the legislature has authorized, which is out of harmony with or violates the statute, or which alters, extends, limits or attempts to breathe life into the source of its legislative power, is said to be void. . . . "

If K.A.R. 21-22-17 were to be construed in accordance with the department's contention, the effect of the regulation would be to nullify and thwart, in cases such as this, the statutory declaration that where an application for rehearing is not granted within ten days of its filing it shall be taken as denied. In our judgment K.S.A. 44-1010 clearly indicates an intention on the part of the legislature that procedures under the Act shall not be subject to undue and protracted delays. Emphasis is given this underlying purpose by the additional provision in 44-1010 that if a rehearing is granted, the commission shall determine the same within thirty days from its submission. As is true of any law, the prime objective in construing laws creating and empowering administrative agencies is to ascertain and give effect to legislative intent. (1 Am. Jur., Administrative Law, §37, p. 839.)

K.A.R. 21-22-17 must be construed in harmony with the statute, so that it, as well as the statute, may be given effect if possible. We believe such a construction is possible and that both the statute and the regulation have a role to play within their respective spheres of operation.

Where an application for rehearing is denied by action of the commission *within* ten days after it is filed, written notice of the commission's order of

denial is to be served in the manner set out in the regulation, and the thirty-day appeal period specified in K.S.A. 1972 Supp. 44-1011 will commence to run from the date of serving notice thereof. Where, however, a denial of the application for rehearing results as a matter of law from the commission's failure to grant the rehearing within ten days from the date the application is filed, written notice is not required to be given the parties and the appeal period runs from the date on which the commission's decisional order was served.

The department places a good deal of emphasis on K.A.R. 21-22-8 which provides in substance that the commission shall permit the parties to submit oral arguments and to file briefs within such time as it determines. The department argues that under this regulation it had a right to present oral argument on its application for rehearing and that it was deprived of this right by the commission's failure to give notice. The commission responds that the regulation refers only to hearings and to rehearings, not to applications for rehearing.

It must be conceded that the regulation is not so clearly worded as to be entirely free from ambiguity, but we believe the difference of opinion is of little relevance at this time. K.S.A. 44-1011 provides that an appeal may be taken from an order of the commission within thirty days from the date it is served. We must assume in the instant case that the commission's order of March 20 was served on or before March 26, the date on which the department filed its application

for rehearing. Accordingly, the appeal period would have commenced to run from not later than March 26. The department's first attempt to file an appeal in this case was made June 7, far out of time, and the trial court correctly concluded it was without jurisdiction to entertain the attempted appeal.

We find no error in the judgment entered by the trial court and the same is affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-452

CITY OF TOPEKA, KANSAS,
CITY OF TOPEKA STREET DEPARTMENT,
Petitioner,

vs.

THE KANSAS COMMISSION ON CIVIL RIGHTS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-_____

CITY OF TOPEKA, KANSAS,
CITY OF TOPEKA STREET DEPARTMENT,
Petitioner,

vs.

THE KANSAS COMMISSION ON CIVIL RIGHTS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, The Kansas Commission on Civil Rights, opposes the Petition for Writ of Certiorari filed herein by Petitioner, City of Topeka, Kansas, Street Department for the following reasons.

OPINIONS BELOW

The Petition for Writ of Certiorari correctly identifies relevant proceedings and opinions below, except it fails to include the relevant pleading in Kansas district court concerning the Federal Constitutional issue.

JURISDICTION

This is a controversy concerning proper statutory construction of state law and procedure which involves no substantial federal question. Petitioner attempts to inflate state issues into federal issues under a Fourteenth Amendment due process theory.

As a municipal corporation, Petitioner has no standing to bring a federal action against the State of Kansas from which Petitioner's authority derives (*Baker* v. *Carr*, 369 U.S. 186, 289 (Frankfurter, J., dissenting) (1961); *Coleman* v. *Miller*, 307 U.S. 433, 441 (1939); *Williams* v. *Mayor*, 289 U.S. 36, 37 (1932); *Risty* v. *Chicago, R.I. & P. Ry. Co.*, 270 U.S. 378 (1925); *Pawhuska* v. *Pawhuska Oil Co.*, 250 U.S. 394, 399 (1918).). The state's legislative power to regulate petitioner absent the protection of the Fourteenth Amendment to the Constitution of the United States is traditionally unquestioned (*Trenton* v. *New Jersey*, 262 U.S. 182 (1922).).

QUESTION PRESENTED

Of first importance to Petitioner's "question" it must be noted that the Commission's administrative rule does not state (as Petitioner asserts) that "all denials" for rehearing will be acted on in writing. K.A.R. 21-22-17 provides: *"When* the commission denies an application for rehearing. . ." it will act in writing. The Supreme Court of the State of Kansas in its opinion in this matter, as cited by Petitioner (Petitioner's Appendix B, at 17 et seq.) clearly finds that only those denials which are affirmatively made before the ten (10) day statutory period for Commission action elapses require written notice because such action would commence the thirty (30) day time for appeal. If the Commission does not affirmatively act, the

time for appeal simply starts to run within ten (10) days from the date the rehearing application was filed.

It appears the real "question" is:

1. Whether the action of the Supreme Court of the State of Kansas affirming the lower court judgment holding the time for appeal from the Commission's order commences to run on the date which the Commission served its decisional order unless the Commission affirmatively acts on a petition for rehearing within ten (10) days in which case written notice is required, is consistent with the due process of law required of the Fourteenth Amendment to the Constitution of the United States.

STATUTES AND REGULATIONS INVOLVED

Kansas Statute, K.S.A. 44-1010, regarding rehearing and appeal:

> 44-1010. Rehearing, when; effect of order changing original decision. Any party being dissatisfied with any order or decision of the commission may, within ten (10) days from the date of the service of such order or decision, apply for a rehearing in respect to any matter determined therein; the application shall be granted or denied by the commission within ten (10) days from the date same shall be filed, *and if the rehearing be not granted within ten (10) days it shall be taken as denied.* If a rehearing be granted the matter shall be determined by the commission within thirty (30) days after the same shall be submitted. No cause of action arising out of any order or decision of the commission shall accrue in any court to any party unless such party shall make application

for a rehearing as herein provided. Such application shall set forth specifically the ground or grounds on which the applicant considers such order or decision to be unlawful or unreasonable. No party shall, in any court urge or rely upon any ground not set forth in said application. An order made after a rehearing abrogating, changing or modifying the original order or decision shall have the same force and effect as an original order or decision. (L. 1961, ch. 248 §7; June 30. Emphasis added to pertinent part.).

STATEMENT OF FACTS

The facts of the case are stated fully in the decision of the Kansas Supreme Court (Petitioner's Appendix B, at 19).

ARGUMENT

I.

Municipality Has No Standing to Raise the Alleged Constitutional Question in Federal Court.

This court has consistently refused to find that "the Federal Constitution restricts state power to design the structure of state political institutions." This policy is effected by denying standing to municipal corporations or their agencies (insofar as claims are made by the subdivisions themselves) seeking to challenge state action which may or may not infringe the interest of some separate unit within the state's administrative structure (*Baker* v. *Carr*, 369 U.S. 186, 289 (Frankfurter, J., dissenting) (1961).). Consequently, as a municipal corporation, Petitioner has no standing to bring a federal action against the State of Kansas from which Petitioner's authority derives (*Williams* v. *Mayor*, 289 U.S. 36, 37 (1932); *Pawhuska* v. *Pawhuska Oil Co.*, 250 U.S. 394, 399 (1918); *Trenton* v. *New Jersey*, 262 U.S. 182 (1922); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1969).).

II.

Federal Issues Not Originally Presented or Fully Developed in Courts Below Will Not Be Considered in the Supreme Court of the United States.

It must be noted that Petitioner states the due process issue was *first raised* in the Supreme Court of the State of Kansas (Petitioner's Certiorari Petition, p. 6). Examination of Petitioner's district court pleadings show only a Sixth Amendment argument as selectively absorbed by the Fourteenth Amendment was alleged (See Respondent's Appendix A). This argument was not raised in the Su-

preme Court of the State of Kansas and no due process argument was included in Petitioner's Statement of Points relied on in the course of its appeal to the Kansas Supreme Court (See Respondent's Appendix B). Petitioner states the issue was first raised in the Supreme Court of the State of Kansas but it did not set out the issue in its "Statement of Points Relied On" in its appellate brief to that court. The Kansas Court repeatedly holds only issues affirmatively presented to and decided by the trial court will be considered on appeal (*National Van Lines Inc.* v. *Jones,* 192 Kan. 338, 388 P.2d 660 (1964); *Moore* v. *Starkey,* 185 Kan. 26, 340 P.2d 905 (1959); *Board of County Commissioners of Johnson County* v. *Brown,* 183 Kan. 19, 325 P.2d 382 (1958); *see* Kansas Supreme Court Rule No. 6, K.S.A. 60-2701.). This rule is in accord with Supreme Court of The United States Rule 23 (1) (f) (*Head* v. *New Mexico Board of Examiners in Optometry,* 374 U.S. 424 (1963); *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *CIO* v. *McAdory,* 325 U.S. 472, 477 (1944).).

This court has invoked the abstention doctrine in cases where there is "the susceptibility of a state statute of a construction by the state courts that would avoid or modify the constitutional question." (*England* v. *Louisiana Board of Medical Examiners,* 375 U.S. 411 (1964); *Zwickler* v. *Koota,* 389 U.S. 241 (1967); *see* Davis, Administrative Law Treatise §23.18 (1970 Supp.).). Petitioner has not originally presented, presumed or fully developed in lower courts the due process argument he now pleads. The instant "issue" is not properly raised for review by this Court.

III.

No Due Process Question Is Presented.

Assuming the issue had been properly raised, Petitioner would be in no better position. Petitioner's due process cases are not in point as they may be well distinguished on the simple fact that in those cases those agency rules are not inconsistent with relevant legislative authority, whereas in the instant case, the Kansas Commission on Civil Rights Rule in question, K.A.R. 21-22-17, would be inconsistent and in direct conflict with its underlying legislative authority, K.S.A. 44-1010, if it is interpreted as Petitioner's desire. The Kansas Supreme Court applies to the instant Commission rule complained of, K.A.R. 21-22-17, the universal rule of construction which requires agency rules to be interpreted in a manner consistent with state statutes. Rules cannot exceed the legislative authority conferred (*Wilcott* v. *Murphy*, 204 Kan. 640, 465 P.2d 959 (1970); *see also* Ryan and Carpenter, *Dubious Doctrines in Administrative Law*, 11 Washburn L.J. 351, 359 (1972).). In its decision, the Kansas Supreme Court utilizes the foregoing doctrine and finds the Kansas Commission on Civil Rights had not violated its rules *since it initiated no action which would require written notice.* Where the commission had not acted within ten (10) days, the Kansas statute, K.S.A. 44-1010, required Petitioner to initiate appeal within thirty (30) days. Ironically, Petitioner now complains of due process when in point of fact, Petitioner did not comply with the Kansas statute which is intended to facilitate due process by prohibiting post-hearing procedures which are protracted or unduly delayed.

CONCLUSION

The Petitioner has not presented a new or novel question for the Court to resolve, has not properly raised and preserved his due process question below, and lacks the requisite standing. The decision below does not deny due process. We request the petition for certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

PETITIONERS
KANSAS DISTRICT COURT APPEAL

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

No. .....

On the complaints of ORIS TUNLEY, JR., VERNON STEELE, and HAROLD ROUNDTREE,
Complainants,

vs

THE CITY OF TOPEKA STREET DEPARTMENT,
Respondent,

vs

THE KANSAS COMMISSION ON CIVIL RIGHTS,
Third Party.

Amended Answer, Counterclaim, and Appeal from Final Order of Kansas Commission on Civil Rights

The City of Topeka, Kansas, a municipal corporation, and for its cause of action against the Kansas Commission on Civil Rights, does state and allege that:

1. On November 24 and 25, 1970, the Kansas Commission on Civil Rights held a hearing on the matters of the complaints of Oris Tunley, Jr., Vernon Steele and Harold Roundtree, complainants, for alleged unlawful

employment practices by the City of Topeka Street Department.

2. On March 20, 1971, the Commission rendered its Findings of Fact, Conclusions of Law, and Order against the Respondent City of Topeka Street Department, a copy of which is attached and marked Exhibit "A" and hereby incorporated by reference.

3. On March 26, 1971, the City of Topeka Street Department filed an Application for Rehearing on the Findings of Fact, Conclusions of Law, and Order entered by the Commission, a copy of which is attached, marked Exhibit "B" and hereby incorporated by reference.

4. The City of Topeka and through former Assistant City Attorney Bruce Harrington, on numerous occasions since the filing of the Application for Rehearing requested orally that it be permitted to orally argue the merits of the Application for Rehearing pursuant to Kansas Administrative Regulation 21-22-8 of the Kansas Commission on Civil Rights. See Exhibit "C", an affidavit to that effect, attached and hereby incorporated by reference.

5. On all occasions referred to in paragraph 4, the KANSAS Commission on Civil Rights summarily denied said requests.

6. The City of Topeka Street Department has been and still is waiting for an opportunity to be heard on the Application for Rehearing pursuant to K.A.R. 21-22-8 and the Sixth Amendment to the United States Constitution.

7. Until the Commission complies with its own rules and regulations and permits the City of Topeka Street Department to argue the merits of the Application for Rehearing, it is estopped from proceeding to enforce said Order entered with respect to the City of Topeka Street

Department, and the thirty (30) day appeal from the Commission to the District Court to obtain judicial relief pursuant to K.S.A. 44-1011 (1970 Supp.) is hereby tolled.

8. The Commission is bound by its Rules and Regulations promulgated pursuant to K.S.A. 44-1005 (1970 Supp.).

9. The provision of K.S.A. 44-1010 to the effect that:

> Any party being dissatisfied with any order or decision of the commission may, within ten (10) days from the date of the service of such order or decision, apply for a rehearing in respect to any matter determined therein; the application shall be granted or denied by the commission within ten (10) days from the date same shall be filed, and if the rehearing be not granted within ten (10) days it shall be taken as denied...

are unconstitutional and void as contrary to the Sixth Amendment to the United States Constitution in that the pertinent part ". . . and if the rehearing be not granted within ten (10) days it shall be taken as denied" denies the Respondent to the right to be heard pursuant to said constitutional provision as selectively absorbed by the Fourteenth Amendment to the United States Constitution.

10. The Commission, by and through Assistant Attorney General of Kansas, Jack N. Williams, filed a *Petition for Enforcement of Final Order* in the District Court of Shawnee County, Kansas, on June 4, 1971.

11. Said act of the Commission was arbitrary, capricious, and oppressive and should be enjoined.

12. The City of Topeka hereby incorporates by reference the statements and allegations found in the original ANSWER filed in the original captioned case.

13. Pursuant to K.S.A. 44-1011 (1970 Supp.) the City of Topeka demands judicial review of the Order of the Kansas Commission on Civil Rights, and that the action of the Commission be set aside for the reasons set out in the Application for Rehearing, attached and marked Exhibit "B".

WHEREFORE, the City of Topeka prays that the Commission be enjoined from enforcing its Order in the above-captioned matter until such a time as the Commission permits the City to exercise its right to be heard with respect to the Application for Rehearing. The City prays that the Court declare K.S.A. 44-1010 unconstitutional and void in that it is contrary to the Sixth and Fourteenth Amendments to the United States Constitution. The City prays that the Court determine that the appeal statute be tolled until such time as the Commission complies with its own Rules and Regulations and that the City be permitted to Appeal the Order of the Commission for judicial review to set aside pursuant to K.S.A. 44-1011 (1970 Supp.). The City also requests its costs in the above action and such other relief as the Court deems just and equitable.

City of Topeka, Kansas
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[Exhibits A, B & C omitted here.]

APPENDIX B

PETITIONERS STATEMENT OF POINTS ON APPEAL TO THE KANSAS SUPREME COURT

Statement of Points Relied On

I

The district court erred in ruling that the Civil Rights Commission was not required to give the Respondent an opportunity to orally argue its Application for Rehearing pursuant to K.A.R. 21-22-8.

II

The district court erred in ruling that the Civil Rights Commission was not required to give the Respondent notice in writing when it denies an Application for Rehearing, pursuant to K.A.R. 21-22-17.

III

The district court erred in ruling that the statute of limitations of thirty (30) days, pursuant to K.S.A. 44-1010, was not tolled by the Commission on Civil Rights failure to follow its own Rules and Regulations and that the Notice of Appeal of the Respondent was void.

IV

The district court erred in ruling that KAR 21-22-17 was consistent with K.S.A. 44-1010 construing "shall" in the KAR to mean "may."